RECENT AMERICAN DECISIONS.

U. S. Circuit Court, Dist. of California.

IN RE PETITION OF THE PACIFIC RAILWAY COMMMISSION TO COMPEL SENATOR LELAND STANFORD TO ANSWER CERTAIN QUESTIONS.

BEFORE FIELD, SAWYER, HOFFMAN and SABIN, JJ.

The powers of the Commission fully stated, and the application to compel the witness to answer denied.

The motion for a peremptory order for witness to answer interrogatories propounded by the Railway Commission has been fully argued, and everything which could be said in its favor has been ably presented by the United States attorney, either in oral or printed arguments. In resisting the motion counsel of respondent have not confined themselves to a discussion of the propriety and necessity of the interrogatories and the sufficiency of the answers given by him, but they have assailed the validity of the act creating the commission so far as it authorizes an examination into the private affairs of directors, officers and employees of the Central Pacific Railroad Company, and confers the right to invoke the power of the federal courts in aid of the general investigation directed. Impressed with the gravity of the questions presented, we have given to them all consideration in our power. The Pacific Railway Commission, created under Act of Congress of March 3, 1887, is not a judicial body. It possesses no judicial power. It can determine no right to the government of companies whose affairs it investigates. Those rights will remain the subject of judicial inquiry and determination as fully as though the commission had never been created, and in such inquiry its report to the president of its action will not be even admissible as evidence of any matters investigated. It is a mere board of inquiry, directed to obtain information upon certain matters and report the result of its investigations to the president, and also to lay the same before Congress. In the progress of its investigations and in furtherance of them, it is in terms authorized to invoke the aid of the courts of the United States in requiring the attendance and testimony of witnesses and the production of books, papers and documents, and the act provides that the Circuit or District Court of the United States within the jurisdiction of which the contumacy or refusal of any person

to obey a subpœna to him may issue an order requiring such person to appear before the commissioners, and produce books and papers and give evidence touching the matters in question. Of all the rights of the citizen few are of greater importance, or more essential to his peace and happiness, than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books and papers from inspection and scrutiny of others. Without enjoyment of this right, all other rights would lose half their value. The law provides for the compulsory production in progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and also in certain cases for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained, and their contents made known against the will of the owners. In the recent case of *Boyd* v. *The United States*, 116 U. S. 616, the Supreme Court held that the provision of a law of Congress which authorized a court of the United States in revenue cases on a motion of a government attorney, to require defendant or claimant to produce in court his private books, invoices and papers, or that the allegations of an attorney respecting them should be taken as confessed, was unconstitutional and void as applied to suits for penalties, or to establish forfeiture of the party's goods.

The court, speaking by Mr. Justice BRADLEY, said: "Any compulsory evidence discovered by extorting a party's oath or compelling the production of his private books and papers to convict him of crime or to forfeit his property, is contrary to the principles of free government; it is abhorrent to the institutions of an Englishman, and it is abhorrent to the instincts of an American; it may suit the purpose of despotic power, but it can not abide the pure atmosphere of political liberty and personal freedom." The language thus used had reference, it is true, to the compulsory production of papers as the foundation for criminal proceedings, but it is applicable to any such production of private books and papers of a party otherwise than in the course of judicial proceedings or direct suit for that purpose. It is a forcible intrusion into and compulsory exposure of one's private affairs and papers without judicial process, or in the course of judicial proceedings, which is contrary to the principles of free government and is abhorrent to the instincts of Englishmen and Americans.

In *Kilbourne* v. *Thompson*, 103 U. S. 168, we have the decision of the Supreme Court of the United States, that neither house of Congress had power to make inquiries into the private affairs of a citizen—that is, to compel the exposure of such affairs. That case was the firm of Jay Cook & Co., who were debtors of the United States, and it was alleged that they were interested in a "real estate pool" in the city of Washington, and that the trustees of their estate and effects had made a settlement of their interests with associates of the firm to the disadvantage and loss of numerous creditors, including the government of the United States. The House of Representatives, by resolution, reciting these facts, authorized the speaker to appoint a committee of five to inquire into the matter and the history of said real estate pool, and the character of settlement, with the amount of property involved in which Jay Cook & Co. were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers and report to the house. The committee was appointed and organized, and proceeded to make the inquiry directed. A subpœna was issued to one Kilbourn, commanding him to appear before the committee to testify and be examined touching the matters to be inquired into, and to bring with him certain designated records, papers and maps relating to the inquiry. Kilbourn appeared before the committee, and was asked to state the names of the five members of the real estate pool and where each resided, and he refused to answer the questions or to produce the books which had been required. The committee reported the matter to the house, and it ordered the speaker to issue his warrant directing the sergeant-at-arms to arrest Kilbourn, and bring him before the bar of the House to answer why he should not be punished for contempt.

On being brought before the House, Kilbourn persisted in his refusal to answer the question and to produce the books and papers required. He was thereupon held to be in contempt, and committed to the custody of the sergeant-at-arms until he should signify his willingness to appear before the committee and answer questions and obey the *subpœna duces tecum*, and it was ordered that in the meantime the sergeant-at-arms should cause him to be confined in the common jail of the District of Columbia. He was accordingly confined in that jail for forty-five days, when he was released on *habeas corpus* by the Chief Justice of the Supreme Court of the District of Columbia. Upon his release he sued the speaker of

the House, members of the committee and sergeant-at-arms for his forcible arrest and confinement. Defendants pleaded the facts recited, to which pleas plaintiff demurred. The demurrer was overruled and judgment was affirmed as to all the defendants except the sergeant-at-arms. They being members of the House were held to be protected from prosecution for their action, but as to Thompson judgment was reversed and the case remanded for further proceedings. In the Supreme Court the case received great consideration, and it was held that the subject-matter of investigation was judicial and not legislative, and there was no power in Congress or in either house on allegation that an insolvent debtor of the United States was interested in a private business partnership, to investigate the affairs of that partnership, and consequently no authority to compel witness to testify on the subject. "The House of Representatives," said the court, "has the sole right to impeach officers of the government and the Senate to try them. Were the question of such impeachment before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses and their answer to proper questions in the same manner and by the use of the same means that courts of justice can, in like cases. Whether the power of punishment in either house by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either house unless his testimony is required in a matter in which that house has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of a citizen. And again, if the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by judicial proceedings, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be excercised was one confided by the constitution to the judicial and not the legislative department of the government. We think it equally clear that the power asserted is judicial and not legislative." And again, "the resolution adopted as a sequence of the preamble contains no hint of any intention of final action by Congress on the subject. In all argument on the case, no suggestion has been made of what the House of Representatives or Congress could have done in the way

of remedying the wrong or securing the creditors of Jay Cook & Co., or even the United States. Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By fruitless we mean that it could result in no valid legislation on the subject to which the inquiry referred."

When the case went back to the Supreme Court of the District of Columbia and was tried, plaintiff recovered a verdict of $100,000 against the sergeant-at-arms. This amount was subsequently reduced to $25,000, which was paid by order of Congress. This case will stand for all time as a bulwark against the invasion of the right of a citizen to protection in his private affairs against unlimited scrutiny of investigation by a congressional committee. Courts are open to the United States as they are to a private citizen, and both can there secure, by regular proceedings, ample protection of all rights and interests which are entitled to protection under the government of a written constitution and laws. The Act of Congress not only authorizes a searching investigation into the methods, affairs and business of the Central Pacific Railroad, but it makes it the duty of the railroad commssioners to inquire into, to ascertain, and report whether any of the directors, officers or employees of that company have been or are now, directly or indirectly, interested, and to what amount or extent, in any other railroad, steamship, telegraph, express, mining, construction, or other business company or corporation, and with which any agreement, undertakings or leases have been made or entered into. There are over one hundred officers, principal and minor, of the Central Pacific Railroad Company, and nearly five thousand employees. It is not unreasonable to suppose that a large portion of these have some interest as stockholders or otherwise in some other company or corporation with which the railway company may have an agreement of some kind, and it would be difficult to state the extent to which the explorations of the commission in the private affairs of these persons may not go if the mandates of the act could be fully carried out; but, in accordance with the principles declared in the case of *Kilbourn* v. *Thompson*, and equally important doctrines announced in *Boyd* v. *The United States*, the commission is limited in its inquiries into the interest of these directors, officers and employees in any other business, company or corporation to such mat-

ters as these persons may choose to disclose. They can not be compelled to open their books and expose such other business to the inspection and examination of the commission. They were not prohibited from engaging in any other lawful business, because of their interests in and connection with the Central Pacific Railroad Company, and that other business might as well be the construction and management of other railroads as the planting of vines or raising of fruit in which some of these directors and officers and employees have been in fact engaged, and they are entitled to the same protection and exemption from inquisitorial investigation into such business as any other citizens engaged in like business. With reference to vouchers respecting which the principal interrogatories are propounded, and to which we are asked to compel answers from witness, it is conceded by the commissioners on this motion that moneys covered by them were not charged against the United States in ascertaining the net earnings of the company. If such were the case, it is difficult to see what interest the United States can have in the disposition of these moneys. Be that as it may, the general courts can not upon that concession aid the commission in ascertaining how moneys were expended, and these courts can not become the instrument of the commission in furthering its investigation. The Act of Congress creating the railroad commission in terms provides, as already stated, that it may invoke the aid of any circuit or district court to require the attendance of witnesses and the production of books, papers and documents relating to the subject of the inquiry, and empowers a court on contumacy or the refusal of persons to obey subpœnas to them, to issue orders requiring them to appear before the commissioners or either of them, and produce the books and papers ordered and give evidence touching matters on question and to punish disobedience to its orders, and does not appear to leave any discretion in the matter with the court. It would appear as though Congress intended that the court should make the order sought upon the mere request of the commissioners without regard to the nature of the inquiry. It is difficult to believe that it could have intended that the court should be thus a mere executor of the commissioners' will, and yet, if the commissioners are not bound, as they have asserted, by any rules of evidence in their investigation, and may receive hearsay *ex parte* statements and information of every character that may be brought to their attention, and the court is to aid them in this

matter of investigation, there can be no room for the exercise of judgment as to the propriety of the questions asked, and the court is left merely to direct that the pleasure of the commissioners in the line of their inquiries be carried out. But if it was expected that the court, when its aid is invoked, should examine the subject of the inquiries to see their character so as to be able to determine the propriety and pertinency of questions and the propriety and necessity of producing the books, papers and documents asked for before the commissioners, then it would be called upon to exercise advisory functions in an administrative or political proceeding or exercise of judicial power. If the former theory can not be invested in the court, if the latter power can only be exercised in cases or controversies enumerated in the Constitution, or in case of *habeas corpus*, the provision of the act authorizing courts to aid in the investigation in the manner indicated must therefore be adjudged void. The Federal courts under the constitution can not be made aids to any investigation by commission or committee into the affairs of any one. If rights are to be protected or wrongs redressed by any investigation, it must be conducted by regular proceedings in courts of justice in cases authorized by the constitution. Inability of courts of the United States to exercise power in any other than regular judicial proceedings was decided in *Hayburn's case* as early as 1792 (2 Dall. 409). The conclusion we have thus reached disposes of the petition of the railroad commissioners, and renders it unnecessary to consider whether the interrogatories propounded were proper in themselves or were sufficiently met by the answers given by Stanford, or whether any of them were open to objection for the assumptions they made, or the imputations they applied. It is enough that the federal courts can not be made instruments to aid the commissioners in their investigations, and it also renders it unnecessary to make any comment upon the extraordinary position taken by them. According to the statement of respondent, to which we have referred, they did not regard themselves bound in their examination by ordinary rules of evidence, but would receive hearsay and *ex parte* statements, surmises, and information of every character that might be called to their attention. It can not be that courts of the United States can be used in furtherance of investigations in which all rules of evidence may be thus disregarded. The motion of the district attorney for a peremptory order upon witness to answer interrogatories propounded

as set forth in the petition of the railrad commissioners, is therefore denied.

We have read the above case with more than ordinary interest, both on account of its own importance and on account of adverse criticism in the daily press. A careful examination of the case convinces us that it is entirely correct and well sustained, both by reason and precedent; indeed, we do not see how a decision to the contrary could possibly have been arrived at. The reasoning of the court on the subject is so conclusive that little need be added to it.

The power to punish for contempt is generally an incident to the exercise of judicial power, and exercisable only where the tribunal has jurisdiction both of the person and the subject-matter. Although American legislative bodies have not been clothed with the judicial function, and, therefore, do not possess general power to punish for contempt, yet, incidental to their legislative authority, they may punish as contempts those acts of members and others which tend to obstruct the performance of legislative duty, or to defeat, impede, or embarrass the exercise of legislative powers: Cooley's Const. Limi., 134; but only where it has jurisdiction of the subject-matter, that is to say, where the subject-matter is legislation, or one of the few cases in which the legislature may exercise judicial or *quasi* judicial power, of which it is clear that the principal case is not one.

The question as to what is a judicial power has frequently been before the courts for determination. Says Judge COOLEY: "To adjudicate upon and protect the rights and interests of individuals, and to that end to construe and apply the laws, is the peculiar province of the judicial department:" Cooley's Const. Lim., 91. "'Powers judicial,' 'judiciary powers' and 'judicatories,' are all phrases used in the constitution; and though not particularly defined, are still so used to designate with clearness that department of government which it was intended should interpret and administer the laws. On general principles, therefore, those inquiries, deliberations, orders, and decrees, which are peculiar to such a department, must in their nature be judicial acts, nor can they be both judicial and legislative, because a marked difference exists between the employments of judicial and legislative tribunals; the former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is applied by the one and made by the other. To do the first, therefore, to compare the claims of parties with the law of the land before established, is, in its nature, a judicial act; but to do the last, to pass new rules for the regulation of new controversies, is, in its nature, a legislative act; and if these rules interfere with the past or the present and do not look wholly to the future, they violate the definition of the law 'as a rule of civil conduct,' because no rule of conduct can, with consistency, operate upon what occurred before the rule itself was promulgated. It is the province of judicial power also to decide private disputes between or concerning persons, but of legislative power to regulate public concerns and to make laws for the benefit and welfare of the state:" *Merrill* v. *Sherburne*, 1 N. H. 199, 203. Per WOODBURY, J.

In the case of *Lloyd* v. *Wayne Circuit Judge*, 24 Am. L. Reg. (N. S.), 790, the subject of judicial power is considered by CAMPBELL, J.; and in the note to that case we had occasion to consider the subject to some extent. The tendency of the legislatures to confuse all of the distinctions between legislative and ju-

dicial powers, and to usurp the powers confided by the constitution to the courts —to say nothing of the violation of the rights of personal security and private property therein involved—makes the principal case a salutary one. Without expressing any opinion as to the merits of the particular point in controversy, it is enough to know that the act in question is a violation of the right to personal security, and confuses the distinctions made by the constitution between legislative and judicial authority. It is clear that the act contemplates that the court should either be the mere executor of the commissioners' will or should exercise advisory functions in an administrative or political proceeding, or in the exercise of judicial power. Clearly the former duty cannot be imposed upon the court, and the latter only in cases enumerated in the constitution. As stated by the court, "The federal courts, under the constitution, cannot be made aids to any investigation by commission or committee, into the affairs of any one. If rights are to be protected or wrongs redressed by any investigation, it must be conducted by regular proceedings in courts of justice in cases authorized by the constitution." The remedy for the wrong sought to be redressed by Congress in the act in question, must, under the constitution, be sought in the regular way, by appeal to a court of competent jurisdiction, proceeding according to the course of the common law or of chancery.

The cases of *Stockdale* v. *Hanssard*, 9 Ad. & El. 1; *Kilbourn* v. *Thompson*, 103 U. S. 168; *Boyd* v. *The United States*, 116 Id. 616; *Lloyd* v. *Wayne Circuit Judge*, 24 Am. L. Reg. (N. S.) 790; and the reasoning of the court in the principal case, would seem, to the mind of an impartial reader, entirely conclusive upon the question in issue; and it is to be hoped that they will prove a warning to future legislatures that the distinctions between judicial and legislative power cannot be broken down at will, and the constitutional rights of the citizen infringed with impunity.

M. D. EWELL.

Chicago.

Supreme Court of Montana.

KELLEY v. CABLE CO.

Where, on the trial of an action brought by an employee against his employer for damages for personal injuries, the only instruction given on the question of ordinary care and reasonable care or diligence was one asked for by the plaintiff, he cannot be heard to complain on appeal that the jury were not sufficiently instructed on that point.

It is error to give to the jury conflicting instructions based upon different views of the law applicable to the case, without such instructions being harmonized by the judge.

In an action for damages brought by an employee against his employer, an instruction to the effect that if the employer employed, as fellow-servants with the employee, men of usual competency and prudence in their business, then defendant is not liable for their negligence, and the law does not require the defendant or his foreman to personally supervise such men, but that he has a right to rely upon their discharging their duties with proper care, is misleading, as suggesting that the employer might be justified in neglecting his duties of supervision.